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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1546

HAROLD FINKLE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, respondent, State of New Jersey, respectfully submits the following additions and corrections to petitioner's statement of the case.

Petitioner, Harold Finkle, was issued Summons No. H-92556 by State Police Trooper John C. Leach, charging him with speeding at 75.3 M.P.H. in a 55 M.P.H. zone on U.S. 322 westbound, on Saturday, May 5, 1973, at 8:30 p.m. A trial was held on July 23, 1973, in the Folsom Borough, Atlantic County, Municipal Court, with the Honorable Thomas K. J. Tuso, J.M.C., presiding. Petitioner appeared *pro se* and no attorney appeared on behalf of the Prosecution.

State Police Trooper John Leach testified that he had occasion to use a troop vehicle with a VASCAR ["visual average speed computer and recorder"] unit on May 5, 1973. The witness also testified that he was certified to operate the VASCAR (which meant that he had been qualified after receiving twenty-five hours of instructions and passing a series of twenty-five tests), that he calibrated the machine both before and after the incident in question (using a calibrated stop watch and a measured half-mile), and that he properly operated the machine at the time in question (T2-13 to T10-20). Overruling petitioner's objection, the court took judicial notice that VASCAR is scientifically accepted and therefore may be introduced as evidence. The court relied on the case of *State* v. *Schmiede,* 118 N. J. Super. 576, 289 A. 2d 281 (Cty. Ct. 1972), in which experts testified as to the scientific accuracy and reliability of VASCAR, and added that it puts an "intolerable burden" on the State to have expert witnesses testify at each hearing in order to lay a foundation for further testimony (T5-5 to 7; T8-20 to T9-8; T10-10 to 14). Petitioner took the stand in his own behalf and admitted that he had been speeding when he stated that if Trooper Leach had told him he was traveling at 60 M.P.H. he would have believed him, but he could not agree that he was going at a speed of 75 M.P.H. (T46-20 to 25). Petitioner's motion to dismiss "on the

grounds that no proper foundation [was] laid for the introduction of VASCAR testimony" was denied (T47-10 to T48-5). Petitioner was found guilty as charged (T49-24 to 25; Pa18 to Pa20).

On October 9, 1973, a trial *de novo* on the record was held in the Atlantic County Court, Criminal Law Division, with the Honorable Manuel Greenberg, J.C.C., presiding. Petitioner was represented by an attorney, who challenged the municipal court's taking of judicial notice of the accuracy of the VASCAR speedmeter (TA2). The court rejected this argument and stated that judicial notice was taken of the "accepted scientific principle" upon which the VASCAR is based: "that speed is nothing more than distance over time." (TA11-20 to 23; TA12-7 to 12). The court also noted that "all that the VASCAR does is change the ratio from one thousand yards per ten seconds to whatever miles are involved per hour. It's just making a change in the ratio." (TA13-1 to 4). Hence, "the only questions involved are, is it working properly, whether the person who was working it was qualified to do it, whether he went through the proper operation at the time in question?" (TA13-23 to TA14-2). The court ruled that since the record below established these factors, the State proved its case beyond a reasonable doubt. Therefore, the judgment of conviction in the municipal court was affirmed (TA14-12 to TA15-5; Pa17).

On October 26, 1973, petitioner duly filed his Notice of Appeal to the New Jersey Superior Court, Appellate Division. On March 4, 1974, argument was heard before the New Jersey Superior Court, Appellate Division. The respondent, State of New Jersey, argued that judicial notice of VASCAR's reliability and accuracy was properly taken at both the municipal court and county court levels. Based on *State* v. *Schmiede, supra,* the State maintained

that the municipal judge had simply taken judicial notice of the records of a state court which included expert opinion on the subject. N. J. Evid. Rule 9(2)(b). Based upon the simple scientific principle (one of "generalized knowledge") that speed equals distance over time, the county court judge properly ruled that judicial notice could be taken of the scientific principle underlying VASCAR. N. J. Evid. Rule 9(2)(e) (Pa22 to Pa23). In order to fully support its position, respondent also provided petitioner and the Appellate Court with numerous, published studies on the VASCAR. These included a 1968 evaluation by the Iowa Highway Patrol and a 1967 evaluation by the Michigan State Police, both of which found VASCAR to be "a valuable and accurate speed measuring device." Furthermore, in order to meet petitioner's challenge to the incidence and margin of error in the operator's management of a VASCAR device, respondent obtained two published studies by the University of North Carolina Highway Safety Research Center, which concluded that the incidence of error was less than one mile per hour. Walker, Council, Barry, Rouse, *An Evaluation of the Operational Efficiency of "VASCAR"—A Speed Measuring Device* (Chapel Hill, N. C.: University of North Carolina Highway Safety Research Center [NC HSRC], 1968); Council, *Retesting of VASCAR Operators: The Effect of a One-Year Period of Use,* (Chapel Hill, N.C.: NCHSRC 1969). These studies corroborated the information elicited from expert witnesses in *State* v. *Schmiede, supra; People* v. *Persons,* 60 Misc. 2d 803, 303 N. Y. S. 2d 728, 730 (Town Ct. 1969); and, *Tiffin* v. *Whitmer,* 320 Ohio Misc. 169, 290 N. E. 2d 198 (Mun. Ct. of Tiffin, 1970).

On May 6, 1974, the New Jersey Superior Court, Appellate Division, affirmed the conviction and upheld the

taking of judicial notice of the scientific accuracy and reliability of the VASCAR. *State* v. *Finkle,* 128 N. J. Super. 199, 319 A. 2d 733 (App. Div. 1974) (Pa5 to Pa16). See New Jersey Rules of Evidence, 9(2)(d), 9(2)(e), 10(1), 10(2), 12(1),(2) and (3) (Pa22 to Pa24). This decision was founded upon the lower courts' rulings, the information supplied by the State on appeal (which, contrary to petitioner's contentions, is subject to objective review by analyzing the various procedures and tests used in each report furnished to petitioner and the Court), and petitioner's failure to show—in any manner —that VASCAR's scientific accuracy and reliability may be refuted.

The New Jersey Supreme Court granted certification, 65 N. J. 575 (1974), and argument was heard on November 18, 1974. The Court granted respondent's motion to enlarge the record so as to include questionnaires completed by the authors of the various reports and studies, which questionnaires were offered to refute petitioner's allegation that the reports were not independently published (Pa3). On December 4, 1974, the New Jersey Supreme Court affirmed petitioner's conviction "substantially for the reasons expressed by the Appellate Division." *State* v. *Finkle,* 66 N.J. 139, 329 A.2d 65 (1974) (Pa2). On January 14, 1975, the Court denied petitioner's motion for a rehearing (Pa4).

Petitioner now claims that he was denied Due Process under the Fifth and Fourteenth Amendments of the United States Constitution. He also claims a denial of his right to confrontation under the Sixth Amendment, and alleges a violation of the prohibitions against *ex post facto* enactments as guaranteed by Article I, section 10, clause 1. Respondent respectfully submits that these contentions of alleged constitutional infringements are without merit or substance and do not warrant review by this Court.

Reasons for Denying Certiorari

It is petitioner's main contention that he has been denied Due Process, under the Fifth and Fourteenth Amendments, and that his convictions in both the municipal and county courts of New Jersey were therefore improper. He does not challenge the validity of the New Jersey Rules of Evidence, but instead attempts to disparage the manner in which they were applied.

Respondent respectfully submits that petitioner fails to allege any "special and important reasons" to support his petition for review on writ of certiori. 28 U.S.C. Supreme Court Rule 19. The New Jersey Courts have not decided "a federal question of substance not [heretofore] determined by this Court." *Ibid.* Nor does petitioner sustain his arguments by showing that the New Jersey Courts have decided the matter at hand in disaccord with applicable decisions of this Court. *Ibid.*

In order to refute petitioner's allegations, respondent will trace the proceedings below from their inception. This method of argument is deemed necessary so as to illustrate that at every stage of the proceedings petitioner was not denied his day in court on the issue of VASCAR's scientific reliability and accuracy. As the record amply proves, no constitutional errors were manifested at any point. Furthermore, petitioner fails to substantiate any contention which would warrant review by this Court.

It is respondent's position that in every possible instance petitioner has been given proper notice and a full opportunity to be heard. The traffic summons initially issued to petitioner served as notice, since under New Jersey Court Rule 7:6-1, a traffic ticket is deemed to be both a complaint and summons. Upon this same ticket

it was indicated that VASCAR was used by the State Police Trooper.

In the municipal court, the judge indicated that the prosecution was not being required to present formal evidence on the question of VASCAR's general scientific accuracy and reliability. Over petitioner's objection, judicial notice was thus taken of the accuracy of VASCAR. In so doing, the court made explicit reference to the reported case of *State* v. *Schmiede, supra,* in which an expert witness from the manufacturer testified as to the machinations of the VASCAR. It is respectfully submitted that the municipal court properly took judicial notice pursuant to N. J. Evid. Rule 9(2)(b), which allows one court to notice the records of another court in the State. The other ground upon which the municipal court judge ruled was his own familiarization with VASCAR. This was valid under N. J. Evid. Rule 10(2), which permits a court to use "any source of relevant information." However, respondent is cognizant of the fact that this could not have been the sole basis for taking judicial notice unless the fact judicially noticed was also one of "common notoriety" or "generalized knowledge." In any event, the court noted the overriding consideration of judicial efficiency and administration when it commented that additional expert testimony on the subject would be time consuming and burdensome. Thus, one of the major objectives of judicial notice was recognized as a primary factor in the court's decision not to require expert testimony. See *Ohio Bell Telephone* v. *Public Utilities Commission,* 301 U. S. 292 (1937); *N. J. Supreme Court Committee on Evidence* (1963), Comment on Rule 9, at p. 28.

A *prima facie* case was adduced when State Police Trooper Leach testified that he was certified to operate

the VASCAR device, the specific VASCAR unit was calibrated (before and after the incident), and he operated the unit correctly at the time in question. See, *e.g., State* v. *Dantonio,* 18 N. J. 570, 579-580, 115 A. 2d 35 (1955) (radar); *State* v. *Schmiede, supra* at 580-581; *People* v. *Persons, supra* at 731; *State* v. *Greul,* 291 Minn. 361, 191 N. W. 2d 428 (1972) (radar); *Everight* v. *City of Little Rock,* 230 Ark. 695, 326 S. W. 2d 796 (1959) (radar).

After the trial *de novo* on the record, petitioner was found guilty of speeding and his conviction was thereby affirmed. Here again, petitioner was on notice that the VASCAR was in issue as the instrument used to detect his speeding infraction. Petitioner presented no argument to allay the county court's decision to take judicial notice of VASCAR's reliability and accuracy. The county court relied upon N. J. Evid. Rule 9(2)(d) or (e), which permits judicial notice to be taken of facts of "common notoriety" or of facts of "generalized knowledge" through resort to sources of reasonably indisputable accuracy. Basically, the court looked to the principle underlying VASCAR, *i.e.,* that velocity (or speed) is nothing more than distance divided by time. Since VASCAR is fundamentally a computer which electronically performs this function, the court ruled that VASCAR was "ripe" for judicial notice.

The county court noted that the record at trial "indicates that the officer had training, had sufficient training in this device to operate it; he tested the machine . . . both before and after the incident in question, and it was found to be accurate; . . . it was established that the machine was properly operated at the time in question." (TA14-12 to 21). Based on these findings, respondent respectfully submits that a *prima facie* case of speeding was proven beyond a reasonable doubt. There is ample

case law to support a conviction based on the reading of a speedmeter, such as VASCAR. *State* v. *Dantonio, supra* at 580, citing *Penny* v. *Nicholas,* 2 K.B. 466, All Eng. 89 (1950); *Cf., People* v. *Blattman,* 50 Misc. 2d 606, 270 N.Y.S.2d 903 (Cty.Ct. 1966); 21 *A.L.R.*2d 1200.[1] Moreover, the acceptance of the results of such checks as *prima facie* evidence of the speed of a motor vehicle does not violate the due process clause of the Federal Constitution, since the burden of proof is not shifted, but merely presents a rule of evidence without determining the guilt of the accused. *Dooley* v. *Commonwealth,* 198 Va. 32, 92 S.E.2d 348 (1956).

Thus it is respectfully argued that petitioner was in no way denied his day in court. Rather, he was put on notice and failed to dislodge either of the courts from their determinations that the time had come for taking judicial notice of VASCAR's scientific accuracy and reliability. Petitioner's argument that he could not confront any expert witnesses completely ignores the basic reason for judicial notice. That is, to alleviate the formal presentation of evidence on a given subject. This, in turn, avoids unnecessary wastes of time and money. See *Ohio Bell Telephone* v. *Public Utilities Commission, supra.* Nor may petitioner now contend that he could have refuted such expert testimony, since he failed to establish in either of the lower courts that VASCAR is unreliable. Therefore, given ample opportunity to challenge the accuracy of the device before and during both of the lower proceedings, petitioner may not allege a denial of due process.

Petitioner again attempted to question the propriety of the taking of judicial notice in the New Jersey Superior

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[1] Also, petitioner admitted he was speeding (T46-20 to 25).

Court, Appellate Division,[2] and the New Jersey Supreme Court. Besides supporting the lower court decisions, respondent sought to present additional, relevant material on VASCAR. Outside studies were referred to in respondent's appellate brief, and copies of these references were given to petitioner and the Court. They are now part of the record. Accordingly, under *N.J.Evid.* 10(2) and 12(1)(2) and (3), the Appellate Division was well within its bounds to take judicial notice of VASCAR's reliability even if the lower courts had not (Pa22 to Pa24).

Succinctly stated, it was respondent's position that the question of VASCAR's scientific accuracy could not be viewed in a vacuum. While there were substantial grounds to support the municipal and county courts' rulings under *N.J.Evid. Rule* 9(2), the need for more information was deemed appropriate and necessary. This is especially true when it is understood that VASCAR's operation does include an human element. Respondent located independent studies which found VASCAR to be reliable and accurate. Moreover, the question of depth perception and reaction time of the operator were both found to be of minimal effect on the proper operation of a VASCAR unit. Barefoot, *Evaluation of VASCAR as a Speed Measuring Device For Highway Patrol* (Raleigh, N.C.: North Carolina Highway Patrol, undated); Dykeman, *Evaluation of VASCAR* (Iowa Highway Patrol, 1968); IIT Research Institute, *The Evaluation of VASCAR* (Chicago, Ill., 1970); Maciejewski, *Evaluation*

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[2] It is submitted that while the Appellate Division simultaneously decided the case of *State* v. *Salup*, 128 N. J. Super. 209, 319 A. 2d 739 (App. Div. 1974), there is absolutely no indication that this case—which also involved VASCAR—was determinative in reaching an opinion in the case at hand.

of "VASCAR" (Michigaan State Police, 1967); Nossett and Burlison, *Evaluation of a Device for Checking the Speed of a Moving Automobile Vehicle* (Indiana State Police, 1966); Onderko, *Evaluation of a Device for Checking and Recording the Speed of a Moving Automotive Vehicle* (Phila., Pa.: The Franklin Institute, 1960); Walker, Council, Barry and Rouse, *An Evaluation of the Operational Efficiency of "VASCAR"—A Speed Measuring Device* (Chapel Hill, N.C.: The University of North Carolina Highway Safety Research Center, 1968); Council, *Retesting of VASCAR Operators: The Effect of a One-Year Period of Use* (Chapel Hill, N.C.: NCHSRC, 1969).[3] These outside sources substantially corroborated the expert testimony elicited in *State v. Schmiede, supra,* and the two reported cases from New York (*People* v. *Persons, supra*) and Ohio (*Tiffin* v. *Whitmer, supra.*) Most importantly, this information exemplified the scientific community's uniformity of opinion that VASCAR is indeed reliable and accurate.

It is respectfully submitted that these outside reports were properly considered by the Appellate Division and the New Jersey Supreme Court. Both courts on appeal could take judicial notice pursuant to *N.J. Evid. Rule* 12. Most importantly, "it is to be noted that *Rule* 12(3) is subject to *Rule* 10(2), which provides that the court may consult and use any pertinent information and that, except for a valid claim of privilege, evidence rules do not apply." *N.J. Supreme Court Committee on Evidence* (1963), *supra* at p. 43. Therefore, petitioner mistakenly bases his attack on these materials by calling them "hearsay." His parochial view of the reliability of these out-

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[3] These studies were all reprinted in a New Jersey Institute of Continuing Legal Education publication, *Understanding the Breathalyzer, VASCAR and Radar, Part II* (Rutgers University 1974).

side sources is grounded upon the fact that he could not find them on a library shelf. In contradistinction, it has been respondent's position throughout the appellate process that the outside reports and studies are independently reliable. This is to say, one need only consider the testing methods and the manner of obtaining the results in order to ascertain the validity of these studies (both scientifically and statistically).

Respondent furthermore asserts that petitioner was not deprived of any right to confrontation as to these materials; first, because they are not subject to the New Jersey evidence rules relating to hearsay, and second, because they may be subjected to objective, scientific scrutiny. For example, petitioner might have shown some bias in the testing procedures, some error in the formulae used, or some lack of logic or reasoning in the conclusions reached. However, it is apparent that petitioner would rather claim what he labels as "constitutional infringements" than present any arguments (or other data) which might tend to question the results of these studies.

Petitioner contends that there has been some sort of prejudgment or bias on the part of the New Jersey Courts in this matter. Such a claim flies in the face of reason and ignores the New Jersey Rules of Evidence. For instance, petitioner contends that the outside studies were unauthenticated and unauthoritative. Pursuant to *N.J.Evid. Rules* 10(2) and 12(1), (2) and (3), respondent obtained affidavits from the various authors as to why their studies were undertaken, whether it was independent, and why their results may be considered valid. These were made part of the record pursuant to a motion to enlarge the record. Although petitioner had his day in court—actually two days: before the Appellate

Division and before the New Jersey Supreme Court—he chose not to attack the merits of these reports and merely insisted that they were improperly being made a part of the record. As explained above, these reports were correctly considered under *N.J.Evid. Rules* 10(2) and 12. Hence, it is respectfully submitted that at no stage of the proceedings was petitioner denied due process of law.

Finally, petitioner's contention that there has been a violation of the prohibition against *ex post facto* enactments is spurious. The prohibition against *ex post facto* laws operates as a restraint on legislative power; it does not apply to changes affected by judicial decision. *Ross* v. *Oregon,* 227 U.S. 150 (1913). Furthermore, the New Jersey Courts did not change any rule of evidence since the same evidence is still required to prove a *prima facie* case of speeding. See, *Calder* v. *Bull,* 3 Dall. 386 (1798).

CONCLUSION

It is respectfully submitted that the petitioner has failed to substantiate any claim of constitutional error in the New Jersey Courts. Petitioner was on notice and had several opportunities to be heard on the taking of judicial notice of the scientific accuracy and reliability of VASCAR. The Courts involved in this matter acted pursuant to N. J. Evid. Rules 9, 10 and 12. Therefore, for all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent
By: ROBERT A. RUBENFELD

ROBERT A. RUBENFELD
Deputy Attorney General
Division of Criminal Justice
Of Counsel and
On the Brief